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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/827,307	04/20/2004	Michael B. Zemel	31894-202097	2558
26694	7590	01/03/2006	EXAMINER	
VENABLE LLP			WEBMAN, EDWARD J	
P.O. BOX 34385			ART UNIT	
WASHINGTON, DC 20045-9998			PAPER NUMBER	

1616

DATE MAILED: 01/03/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/827,307	Applicant(s) ZEMEL ET AL.	
	Examiner Edward J. Webman	Art Unit 1616	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 20 April 2004.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-22 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-22 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date <u>4/20/04, 5/27/05, 5/27/05</u> | 6) <input type="checkbox"/> Other: _____ |

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-8, 10-14, 16, 17, 19-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Metz et al (AJH 1:58-60 1988).

Metz et al teach a reduction in body fat content in rats consuming higher diets of calcium (abstract).

It would have been obvious to one of ordinary skill to formulate a high calcium diet for humans to achieve the beneficial effect of a reduction in body fat content in view of the Metz et al results.

As to the particular claimed dosage frequency, amount, and vehicle, optimum parameters may be obtained by routine experimentation. In re Boesch 205 USPQ 215 (CCPA 1980). One of ordinary skill will recognize that reduction in body fat content is a consequence of lipolysis of fat in adipocytes.

Claims 1-8, 10-14, 17-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Skinner et al (Scand J Nutr 2/99 suppl 34 p. 45S).

Skinner et al teach that children's fat mass is moderated by dietary calcium (abstract).

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It would have been obvious to one of ordinary skill to formulate a high calcium diet for children to achieve the beneficial effect of a reduction in body fat content in view of the Skinner et al.

As to the particular claimed dosage frequency, amount, and vehicle, optimum parameters may be obtained by routine experimentation. In re Boesch 205 USPQ 215 (CCPA 1980). One of ordinary skill will recognize that reduction in body fat content is a consequence of lipolysis of fat in adipocytes.

Claims 1-17, 19-21 are rejected under 35 U.S.C. 103(a) as being unpatentable over Summerbell et al (BMJ 317 1998 p. 1487-89).

Summerbell et al teach weight loss in obese patients on a diet comprising milk or yoghurt (abstract, p. 1488 under "milk only").

It would have been obvious to one of ordinary skill to formulate a high calcium diet for obese patients to achieve the beneficial effect of a reduction in body fat content in view of the Summerbell et al.

As to the particular claimed dosage frequency, amount, and vehicle, optimum parameters may be obtained by routine experimentation. In re Boesch 205 USPQ 215 (CCPA 1980). As to the calcium, it is well known, even to the layman, that dairy products contain calcium. One of ordinary skill will recognize that reduction in body fat content is a consequence of lipolysis of fat in adipocytes.

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The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-22 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-66 of U.S. Patent No. 6,384,087.

Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant claims encompass the patented claims as to the particular calcium containing products.

Claims 1-22 rejected.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Edward J. Webman whose telephone number is 571-272-0633. The examiner can normally be reached on M-F from 8 AM to 5 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, S. Padmanabhan, can be reached on 571-272-0629. The fax phone

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number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



**EDWARD J. WEBMAN
PRIMARY EXAMINER
GROUP 1500**